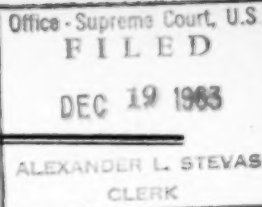


NO. 83-847



IN THE

Supreme Court of the United States

October Term, 1983

PETER KOURAKOS,

Petitioner,

against

JAMES H. TULLY, JR., President, and others, MEM-
BERS CONSTITUTING THE STATE TAX COM-
MISSION OF THE STATE OF NEW YORK,
Respondents.

**Respondents' Brief in Opposition to Petition for a Writ
of Certiorari**

ROBERT ABRAMS

*Attorney General of the State of New
York, Attorney for Respondents
The Capitol*

*Albany, NY 12224
(518) 474-7178*

PETER H. SCHIFF

*Acting Attorney in Chief
Appeals and Opinions*

PETER G. CARY

*Assistant Attorney General
Of Counsel*

Dated: December 15, 1983

Counterstatement of Questions Presented.

1. Can a taxpayer validly invoke his Fifth Amendment privilege against self-incrimination within the neutral setting of a civil tax assessment proceeding without making any showing of potential incrimination?

2. Is there any constitutional issue raised by the holding of the Appellate Division that the determination of the New York State Tax Commission assessing unincorporated business tax against petitioner has a rational basis in the record?

Page

Table of Contents.

	Page
Counterstatement of Questions Presented	i
Preliminary Statement	1
New York Statute Involved	2
Statement of the Case	2
Reasons for Denying Certiorari	4
CONCLUSION. For the foregoing reasons, the petition for a writ of certiorari should be denied.	8

TABLE OF AUTHORITIES.

CASES:

Albertson v. SACB, 382 US 70 (1965)	4
California v. Byers, 402 US 424 (1971)	4, 6
Edwards v. Commissioner of Internal Revenue, 680 F2d 1268 (9th Cir, 1982)	4
Garner v. United States, 424 US 648 (1976)	5, 6
Hoffman v. United States, 341 US 479 (1951)	4
Ueckert v. Commissioner of Internal Revenue, ____ F2d ____ (8th Cir, 11/17/83)	4

	Page
United States v. Janis, 428 US 433 (1976).....	7
United States v. Neff, 615 F2d 1235 (9th Cir, 1980), cert den 447 US 925 (1981).....	5
United States v. Oliver, 505 F2d 301 (7th Cir, 1974).	6
United States v. Rylander, ____ US ____, 103 S Ct 1548 (1983).....	7
United States v. Sullivan, 274 US 259 (1927).....	5
U.S. v. Ward, 448 US 242 (1980).....	6
U.S. v. Verkuilen, 690 F2d 648 (7th Cir, 1982).....	4
UNITED STATES CONSTITUTION:	
Fifth Amendment.....	6
NEW YORK STATUTES:	
Civil Practice Law and Rules, Article 78.....	5
Civil Practice Law and Rules, §7803(4).....	7
Tax Law, §689(e).....	7

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

PETER KOURAKOS,

Petitioner,

against

JAMES H. TULLY, Jr., President, and others, Members
Constituting the State Tax Commission of The State of
New York,

Respondents.

**Respondents' Brief in Opposition to Petition for a Writ of
Certiorari.**

Preliminary Statement.

The constitutional issue which petitioner sought to raise in the New York State courts was whether the imposition of unincorporated business tax upon his unexplained "miscellaneous" income for failure to sustain his statutory burden of proof unconstitutionally penalized the exercise of his Fifth Amendment privilege against self-incrimination. This issue provides no predicate for a writ of certiorari, however, for the New York courts expressly

declined to reach it, holding that petitioner had not properly invoked that privilege in the first place.

New York Statute Involved.

Tax Law, §689(e):

“(e) Burden of proof. In any case before the tax commission under this article, the burden of proof shall be upon the petitioner.”

Statement of the Case.

Petitioner filed New York State income tax returns for the years 1972 and 1973 which listed “miscellaneous” income in the amounts of \$30,000 and \$37,000, respectively. Neither return contained any information concerning the nature and source of that income. The returns did establish by omission, however, that this income was not employee wages, dividends, interest, capital gain, or any of the other specific sources listed in Schedule A of New York’s income tax return.

When petitioner failed to respond to an inquiry concerning the nature and source of his “miscellaneous” income, the New York State Department of Taxation and Finance issued a Notice of Deficiency informing petitioner that it deemed that income to be business income subject to an unincorporated business tax of \$2,585, plus penalties and interest.

Although petitioner requested a hearing before the New York State Tax Commission to review this assessment, he did not appear personally or present any evidence or

testimony. His attorney merely informed the hearing officer that petitioner refused to provide any information concerning the source of his miscellaneous income, relying on his Fifth Amendment privilege against self-incrimination.

In its determination, the Tax Commission held that petitioner had failed to sustain his statutory burden of proving that his miscellaneous income was not subject to the unincorporated business tax. It further held that the privilege against self-incrimination did not relieve taxpayers of the duty to file complete tax returns or estop the Commission from imposing an unincorporated business tax.

Before the New York Appellate Division, Third Department, the court of first instance review, petitioner argued that imposition of the unincorporated business tax here was an unconstitutional penalty imposed upon the exercise of his Fifth Amendment privilege. The Appellate Division stated, however, that "we find it unnecessary to even confront this proposition," since petitioner had not made a sufficient showing to invoke his privilege properly in the first place (6a).*

The court next rejected petitioner's argument that the Commission's tax assessment was "without foundation" (7a). It reasoned that "given the other information on petitioner's return, attribution of miscellaneous other income to an unincorporated business was obviously reasonable" (*id.*). The Tax Commission's determination was therefore sustained.

By order dated June 16, 1983, the New York Court of Appeals dismissed petitioner's appeal, *sua sponte* "upon

*Parenthetical references are to petitioner's Appendix.

the ground that no substantial constitutional question is directly involved" (3a-4a). By order dated September 29, 1983, that court denied petitioner's motion for clarification of its prior order, or in the alternative, for leave to appeal (1a-2a).

Reasons for Denying Certiorari.

A.

The New York courts correctly declined to address the constitutional issue proffered by petitioner; it therefore cannot serve as a predicate for a writ of certiorari. Courts have long held that a valid claim of the Fifth Amendment privilege must be based upon "substantial hazards of self-incrimination" that are real and appreciable. *California v. Byers*, 402 US 424, 429 (1971); *Edwards v. Commissioner of Internal Revenue*, 680 F2d 1268, 1270 (9th Cir, 1982). Moreover, a witness is not excused from answering a question merely upon his own declaration; he must first make a colorable showing that he is involved in a criminal activity. *Hoffman v. United States*, 341 US 479, 486 (1951); *U.S. v. Verkuilen*, 690 F2d 648, 654 (7th Cir, 1982); *Ueckert v. Commissioner of Internal Revenue*, ____ F2d ____ (8th Cir, 11/17/83). A court must be able to determine "from the implications of the question, in the setting in which it is asked" that a response might result in incrimination. *Hoffman v. United States*, *id.*

These principles are particularly applicable within the context of a civil tax collection proceeding, since "the questions in [an] income tax return [are] neutral on their face and directed at the public at large." *Albertson v. SACB*, 382 US 70, 79 (1965). Because the average taxpayer does not face a substantial risk of incrimination when he

files his tax return, Federal courts have required taxpayers to make a strong, positive showing of potential incrimination before they may validly invoke their Fifth Amendment privilege within this neutral setting. *Garner v. United States*, 424 US 648, 660-661 (1976); *United States v. Neff*, 615 F2d 1235 (9th Cir, 1980), cert den 447 US 925 (1981). In the words of this Court, a taxpayer "could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *United States v. Sullivan*, 274 US 259, 264 (1927).

That is exactly what petitioner sought to do here, for he made no showing whatever to support his claim of privilege either at the administrative tax assessment hearing or during the subsequent proceeding before the Appellate Division under Article 78 of the New York Civil Practice Law and Rules. Contrary to the unreferenced assertions in his petition (p. 11), petitioner did not even attempt to establish that his unexplained income had been derived from illegal activity. As found by the Appellate Division, his attorney merely informed the administrative hearing officer that, based upon the privilege against self-incrimination, petitioner would provide no information concerning the nature and source of his "miscellaneous income" (6a). No further explanation was provided. The Appellate Division correctly concluded, therefore, that "[n]othing in this record, apart from his counsel's assertion to that effect, indicates that revelation of the source of petitioner's other income will bring to light his involvement in any criminal activity" (*id.*).

Moreover, even if petitioner had validly invoked his privilege here, settled case law establishes that the imposition of unincorporated business tax on his unexplained

"miscellaneous" income did not constitute an impermissible penalty. This Court has held that the government can require certain basic disclosures fundamental to a neutral reporting scheme without violating the privilege against self-incrimination. *California v. Byers*, *supra*, 402 US at p. 424). Consistent with this rule, the Federal Courts have, in turn, held that the Fifth Amendment does not relieve a taxpayer of his common obligation under the Internal Revenue Code to report fully all information concerning his income, even though he may be incriminated thereby. *United States v. Oliver*, 505 F2d 301, 306-308 (7th Cir, 1974) (Stevens, J.). In *U.S. v. Ward*, 448 US 242, 258-259 (1980), Justice Stevens (dissenting on other grounds) aptly stated the general rule with respect to tax disclosures:

"when the general income tax laws require a full reporting of each taxpayer's income in order to fulfill the Government's regulatory objectives, the fact that a particular answer may incriminate a particular taxpayer is not a sufficient excuse for refusing to supply the relevant information required from every taxpayer."

Even after a taxpayer has validly invoked his Fifth Amendment privilege, the government can still seek to complete his return administratively, with whatever information it can obtain from any source. *Garner v. United States*, 424 US, *supra*, at pp. 651-652.

Finally, in language directly applicable here, this Court recently stated that it would countenance no arguments which "would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a

burden which would otherwise have been his." *United States v. Rylander*, ____ US ____, 103 S Ct 1548, 1553 (1983). The Fifth Amendment therefore does not relieve petitioner, or any other taxpayer, of the obligation to come forward with sufficient information to sustain his burden of proof in a tax collection matter.

B.

Petitioner also argues that the Appellate Division erred in holding, based upon Tax Law, §689's presumption of correctness, that the Tax Commission's assessment of unincorporated business tax had a rational basis (Pet, pp. 19-24).^{*} While this Court has held that a "naked" tax assessment without any foundation whatsoever is arbitrary and erroneous, there is no indication that this raises an issue of constitutional dimension. *United States v. Janis*, 428 US 433, 442 (1976). Rather, in this case, the inquiry concerning the evidentiary basis for the Commission's assessment focuses solely upon the statutory requirement that administrative determinations rendered following a hearing be based upon substantial evidence in the record. Civil Practice Law and Rules, §7803 (4).

In any event, the Appellate Division expressly rejected petitioner's argument that the assessment of unincorporated business tax was "without foundation" (7a). Despite petitioner's failure to provide any information to sustain his burden of proving error, this was not merely a "naked" assessment. New York State's income tax return contains a Schedule A, requiring taxpayers to classify their income by source. This schedule lists thirteen different categories of income, including (among others) wages,

^{*}Tax Law, §689(e) provides that "in any case before the tax commission under this article, the burden of proof shall be upon the petitioner."

dividends, interest, pensions, rents, sale or exchange of property and capital gains. By failing to list his income under any of these specific categories, petitioner eliminated by omission virtually all non-business sources. This, coupled with petitioner's utter failure to supply any evidence whatsoever to sustain his burden of proof, provides a rational basis for the Tax Commission's assessment. Thus, the Appellate Division correctly concluded that "[g]iven the other information on petitioner's return, attribution of miscellaneous other income to an unincorporated business was obviously reasonable" (7a).

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
December 8, 1983

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of
New York
Attorney for Respondents

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

PETER G. CRARY
Assistant Attorney General
of Counsel